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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

YOUSIF HALLOUM, Plaintiff and Appellant, v. DFO, INC., Defendant and Respondent.	C059481 (Super. Ct. No. CV022027)

Plaintiff Yousif Halloum sought to open a Denny's franchise and met with employees of defendant DFO, Inc. (Denny's), the entity that awards Denny's franchises. Halloum's efforts came to naught and he filed suit against Denny's, alleging breach of oral contract, promissory estoppel, negligent misrepresentation, unlawful discrimination, and unfair business practices. The trial court granted summary judgment in favor of Denny's. Halloum appeals, arguing various errors on the part of the trial court: failure to consider the legal theory asserted in his complaint, applying the wrong standard to the equitable estoppel claim, construing his unfair competition claim too narrowly, and ignoring a triable issue of fact in conjunction with his

negligent misrepresentation and discrimination claims. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 1999 Halloum contacted Denny's about becoming a Denny's franchisee. In May 1999 Denny's sent Halloum a franchise application and financial disclosure authorization form. That December, Halloum sent Denny's the application, a financial statement, and the financial disclosure authorization.

Shortly afterward, Denny's sent Halloum a 1999 Denny's uniform franchise offering circular, which stated Halloum would have to pay a $35,000 franchise fee, pay royalties to the company, and make a minimum initial investment of approximately $392,000 to open a Denny's franchise. In addition, the circular included a form of the written franchise agreement that a franchisee was required to sign if awarded a franchise.

Prior to the award of a franchise, Denny's managers in the field make the initial contact with applicants. However, these managers have no authority to approve a franchise or make any representations concerning the approval of a franchise application. The decision to award a franchise and approve a proposed franchise site location was made by a committee at Denny's corporate headquarters.

In early 2000 two Denny's employees visited Halloum's site. The employees told Halloum that Denny's would have to approve him as an operator and approve the site before he could be awarded a franchise.

In March 2000 Malcolm Avery, a Denny's manager, interviewed Halloum to assess his potential as a franchise operator. Avery possessed no authority to award a franchise to Halloum.

Avery told Halloum he would not support his application for a franchise unless he hired a full-time manager. Halloum agreed he needed a full-time manager since he would be involved in other development projects.

In July 2000 Halloum traveled to the Denny's South Carolina corporate headquarters for an interview. According to Halloum, Jim Lyons, vice president of franchise development for Denny's, verbally approved Halloum's franchise application, provided he find a full-time manager/operator. Halloum's application remained pending because he needed to obtain an operational manager acceptable to Denny's, and Halloum's site had not been approved.

At that time, the legal administrator for Denny's, Lucy Clark, was responsible for officially notifying applicants of the award of a franchise. Clark also issued to successful applicants the written franchise agreement. If Halloum's application had been approved following the corporate interview, Clark would have notified him in writing and issued a franchise agreement.

Following his interview, Halloum secured the services of Mike Abu-Ramadan and Farouk Diab, owners of a Coco's restaurant in Lodi, as managers of the proposed Denny's franchise. Representatives from Denny's advised Halloum that Abu-Ramadan and Diab would have to sell the Coco's franchise before Denny's

would consider them acceptable as managers for the proposed Denny's franchise. The pair sold their Coco's restaurant in May 2002. In September 2000 Abu-Ramadan submitted an application to Denny's.

In December 2000 the Denny's director of franchise development, Steve Bielewicz, sent Halloum a Denny's franchise site analysis package for new sites. A franchise applicant who owns the proposed franchise site must obtain two approvals: one for the applicant to become a franchisee and one for the site location. Bielewicz instructed Halloum to return the completed package to Ted Liner, director of sales and real estate development.

In August 2001 Halloum submitted an incomplete franchise site analysis package. The site analysis package lacked a cash flow/break-even analysis, site layout sketch, current corporate and personal financial statements, and other required information. Halloum also failed to sign the statement in the package acknowledging that "neither submission of this request for site review, nor recommendation of acceptance by a Denny's representative constitutes acceptance of the above-described location and that only written notification by Denny's, Inc. will constitute site acceptance."

That fall Halloum and Abu-Ramadan interviewed with Peggy Patton, regional director of franchise operations for Denny's, and Bill Schafer, a franchise operations manager. Patton did not have final authority to approve Halloum's application but could only make a recommendation to corporate headquarters

regarding whether or not to give operational approval to an applicant.

Prior to being approved as a Denny's franchisee, proposed operational managers must be interviewed at the corporate level. Neither Abu-Ramadan nor Diab went through the corporate interview process.

In December 2001 Liner informed Halloum that Denny's would not approve a franchise at his Lodi location. The next day, Halloum wrote to Liner, claiming his franchise had already been verbally approved. According to Halloum, in January 2002 Liner visited the proposed site and verbally expressed approval of the site.

In March 2002 Timothy Flemming, a Denny's vice president, wrote to Halloum, disputing his claim that the site had been approved or that Abu-Ramadan and Diab had been operationally approved.

In February 2003 Flemming wrote to Halloum, stating Halloum had once again submitted an incomplete site analysis package. The package lacked profit and loss statements for the first year of operation, a break even sales level calculation, a site layout sketch, and current personal and corporate financial statements.

Later that month Halloum submitted another site analysis package. However, this package was also incomplete, lacking corporate and personal financial statements. Halloum also failed to sign the acknowledgment that "only written notification by Denny's, Inc. will constitute site acceptance."

Mounir Sawda, vice president of franchise development, reviewed completed site analysis packages and made recommendations to the corporate committee, which made the final decision on site approval and whether to award a franchise. Sawda rejected Halloum's application for approval because he never received a completed site analysis package with a recommendation from employees in the field.

On February 25, 2003, Flemming wrote to Halloum, stating: "On December 6, 1999 you submitted an application for a proposed Denny's restaurant in Lodi. Since that time, we repeatedly asked you to submit additional materials, but you did not comply. Therefore, we will no longer consider your proposal for a Denny's restaurant at this location. There are many continuing issues with this site that we have already spent a considerable amount of time on and would take much too long in the future to resolve. [¶] This is a final decision and no further consideration will be given to your site application."

Halloum filed his complaint in October 2003, alleging causes of action for breach of oral contract, promissory estoppel, negligent misrepresentation, unlawful discrimination, and breach of section 17200 of the Business and Professions Code. Halloum contended that Denny's breached an oral agreement to complete approval of his franchise application if he obtained a full-time operator/manager. However, after Halloum met this requirement, Denny's denied his application. Halloum also disputed the claim by Denny's that he failed to submit a complete site analysis package.

Denny's filed a motion for summary judgment. The court sanctioned Halloum for untimely filing of his opposition to the Denny's motion by not considering his separate statement of undisputed facts, his memorandum in opposition, and his declaration in opposition.

The trial court granted the motion for summary judgment filed by Denny's. The court found the alleged oral contract was barred by the statute of frauds. In addition, the court determined Halloum failed to produce evidence that his reliance on any promise or misrepresentations allegedly made by Denny's personnel was reasonable.

Following entry of judgment, Halloum filed a timely notice of appeal.

DISCUSSION

Standard of Review

A motion for summary judgment must be granted if the submitted papers show there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The moving party initially bears the burden of making a "prima facie showing of the nonexistence of any genuine issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.) "Thus, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would require a reasonable trier of fact to find any underlying

material fact more likely than not—otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact." (*Ibid*., italics omitted.) Once the moving party has met its burden, the burden shifts to the opposing party to show the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subds. (c), (p)(2).)

We review de novo the record and the determination of the trial court. First, we identify the issues raised by the pleadings, since it is these allegations to which the motion must respond. Second, we determine whether the moving party's showing has established facts negating the opponent's claims and justifying a judgment in the moving party's favor. When a summary judgment motion prima facie justifies a judgment, the final step is to determine whether the opposition demonstrates the existence of a triable, material issue of fact. (*Barclay v. Jesse M. Lange Distributor, Inc.* (2005) 129 Cal.App.4th 281, 290.)

Breach of Oral Contract

Halloum argues the trial court erred in finding the oral contract entered into on July 24, 2000, was barred by the statute of frauds, or, in the alternative, the court failed to decide whether a bilateral oral contract was created. Halloum argues the trial court committed an error of law in determining the oral agreement was barred by the statute of frauds because it failed to decide the motion for summary judgment on the basis of the legal theory asserted in the complaint.

Former Commercial Code section 1206 (section 1206), repealed in September 2006 (Stats. 2006, ch. 254, § 24), stated: "[A] contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars ($5,000) in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his or her authorized agent." (§ 1206, subd. (1).)

In granting summary judgment, the trial court determined the alleged oral contract between the parties could not be broken up into incremental amounts of $5,000 each, which would not be barred by the statute of frauds. The standard franchise agreement, which is attached to the 1999 Denny's uniform franchise offering circular, requires a franchisee to pay an initial franchise fee of at least $35,000, plus royalties. Therefore, the trial court found, the statute of frauds barred enforcement of the alleged oral agreement between Denny's and Halloum.

Halloum disagrees, arguing the 2006 repeal of section 1206 was retrospective, and thus the statute of frauds does not apply to the oral contract. We disagree.

First, we note that while section 1206 was repealed, its provisions were reenacted as a part of the same legislation and relocated to section 1624.5 of the Civil Code. (Stats. 2006, ch. 254, §§ 1, 24.) The reenacted provisions are considered as

having been the law from the time they were originally enacted. (Gov. Code, § 9605; *Estate of Childs* (1941) 18 Cal.2d 237, 245.)

In any event, there is a presumption against the retroactive application of statutes. A retroactive application of a statute requires either express language or clear and unavoidable implication from the Legislature. A retroactive application will not be given to a statute that interferes with antecedent rights unless that is the unequivocal and inflexible import of the terms of the statute and the manifest intention of the Legislature. A statute that is ambiguous with respect to retroactive application is construed to be unambiguously prospective. (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840-841.)

At the time of the alleged oral agreement, section 1206 provided Denny's an absolute defense to Halloum's claim of breach of an oral contract. "[T]he legislature may not, under pretense of regulating procedure or rules of evidence, deprive a party of a substantive right, such as a good cause of action or an absolute or a substantial defense which existed theretofore." (*Morris v. Pacific Electric Ry. Co.* (1935) 2 Cal.2d 764, 768.) Accordingly, the repeal of section 1206 did not retroactively deprive Denny's of its right to assert a statute of frauds defense to Halloum's cause of action for breach of oral contract.

Halloum's Reliance on Denny's Employees

Halloum argues the trial court erroneously decided a "proto-typical" question of fact: whether his reliance on

Lyons's promise was reasonable. According to Halloum, Lyons had both actual and ostensible authority to promise him a Denny's franchise.

Civil Code section 2330 provides that "An agent represents his principal for all purposes within the scope of his actual and ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal." Halloum bears the burden of proving agency of sufficient scope, actual or ostensible, to charge Denny's with the acts of its alleged agent. (*Mannion v. Campbell Soup Co.* (1966) 243 Cal.App.2d 317, 320 (*Mannion*).)

Actual authority is authority a principal intentionally confers upon its agent, or intentionally or by want of ordinary care allows the agent to believe he or she possess. (Civ. Code, § 2316.) Actual authority stems from conduct of the principal that leads the agent to reasonably believe the principal consents to the agent's act. (*Mannion*, *supra*, 243 Cal.App.2d at p. 320.)

Ostensible authority arises when the principal either intentionally or by want of ordinary care causes or allows a third person to believe the agent to possess authority. (Civ. Code, § 2317.) Ostensible authority stems from the conduct of the principal that leads a third party reasonably to believe the agent is authorized to bind the principal. (*Mannion*, *supra*, 243 Cal.App.2d at p. 320.)

In *Mannion*, the plaintiff physician sued a company for breach of an oral contract to employ him as a plant medical director so long as he could physically perform the work. The physician alleged the company's personnel manager made the oral agreement with him. However, the personnel manager testified he possessed no authority to contract with personnel without prior company approval. (*Mannion*, *supra*, 243 Cal.App.2d at pp. 318-323.)

The court in *Mannion* determined that such an oral contract diverged significantly from the company's standard employment practices. The court held: "When a corporation clothes its officials with apparent authority to hire, it does not impliedly authorize such extraordinary contracts. '"Plain language of the managing board, clearly showing that such was the intention of the corporation . . . must be found to justify such a hiring."' [Citations.]" (*Mannion*, *supra*, 243 Cal.App.2d at p. 323.) The court concluded that even assuming the truth of the physician's testimony about the oral promise, "It describes no conduct of Campbell Soup . . . thus supporting no inference of actual or ostensible authority to bind the company." (*Id.* at p. 324.)

In the present case, Denny's developed a procedure for awarding a franchise. This procedure, set forth in writing, involves a variety of employees at various levels evaluating a potential candidate through interviews and visits to the proposed franchise site. The evaluating employees forward their recommendations regarding prospective franchisees to company headquarters. Final approval of a franchise application is made

at the corporate level, and notification is in writing from Denny's to the applicant. A written franchise agreement follows, to be signed by the franchisee and an authorized Denny's representative. Denny's never approved Halloum's application.

Halloum failed to present any evidence that Denny's took any action to cause its employees or Halloum to believe any Denny's employee possessed any authority to enter into a franchise agreement without written consent from Denny's. None of the Denny's employees Halloum interacted with had any authority, either actual or ostensible, to conditionally approve his franchise application.

Halloum disagrees, arguing Lyons had actual authority to make the representation that Denny's would approve Halloum's franchise application if he obtained a manager/operator. In support, Halloum quotes Lyons's job description, claiming, "This is an admission by the principal, Denny's, that Mr. Lyons is its actual agent and employee. It is also a statement from which Mr. Halloum could reasonably infer that Mr. Lyons was an expert in the field with special knowledge and skills as to how franchises are developed and become operational, whose representations as how to become a Denny's franchisee could be relied upon."

However, a mere recitation of a job description, which nowhere states Lyons has any responsibility for franchise decisions, does not provide evidence of actual authority. We agree with the trial court's assessment that Halloum failed to

produce evidence that his reliance on any promises or misrepresentations made by Denny's personnel was reasonable.

Promissory Estoppel

Halloum argues a triable issue of fact exists as to whether promissory estoppel applied to impose liability on Denny's for the representations made by its ostensible agent. Under the doctrine of promissory estoppel, a promise that the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and that does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires. (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310.) To be binding, the promise must be clear and unambiguous. (*Lange v. TIG Ins. Co.* (1998) 68 Cal.App.4th 1179, 1185.)

Halloum argues his reliance upon the promise Lyons made was reasonable because Lyons "was a top official in Denny's." In the alternative, Halloum argues that the question of whether his reliance on Lyons was reasonable was a question of fact to be decided by a jury. We disagree.

Ostensible authority of an agent cannot be based on the agent's conduct alone; instead, there must be evidence of conduct by the principal that causes a third party to reasonably believe the agent possesses the authority. (*Lindsay-Field v. Friendly* (1995) 36 Cal.App.4th 1728, 1734.) In the present case, Denny's advised Halloum at the outset that no franchise

agreement would exist until it was acknowledged by Denny's in writing. Moreover, Denny's explicitly told Halloum none of its employees possessed the authority to award a franchise. Under these circumstances, Halloum cannot establish the elements of promissory estoppel.

Negligent Misrepresentation

Halloum contends there is a triable issue of fact as to whether Lyons's representations regarding award of the franchise constituted a negligent misrepresentation. According to Halloum, "Denny's claimed that none of its managers, employees, and officers had authority to make any promises or representations concerning the final approval of a franchise application. That being the case, the fact Mr. Lyons made the promise he made was negligence. He did something he had been trained not to do." Halloum also asserts that negligent misrepresentation constitutes a form of unfair business practice, and thus to the extent there is a triable issue of fact on his unfair competition claim, summary judgment on the unfair competition claim must also be reversed.

When a defendant makes false statements, honestly believing them to be true but without reasonable ground for such belief, the defendant may be liable for misrepresentation, a form of deceit. If the defendant's belief is both honest and reasonable, the misrepresentation is innocent and there is no tort liability. Justifiable reliance on the part of the plaintiff is also an essential element of a cause of action for negligent misrepresentation. A plaintiff cannot read something

into a neutral statement in order to justify a claim for negligent misrepresentation. Negligent misrepresentation requires a positive assertion. An implied assertion or representation will not suffice. (*Residential Capital v. Cal-Western Reconveyance Corp.* (2003) 108 Cal.App.4th 807, 827-828.)

Here, Denny's informed Halloum in writing that an award of a Denny's franchise would be communicated to the applicant in writing. Denny's also notified Halloum that he could not rely on verbal representations by company employees, but that acceptance would be exclusively in writing. Halloum never received written confirmation that Denny's had awarded him a franchise.

Even assuming that Lyons's statement could be imputed to Denny's, Halloum cannot establish justifiable reliance on Halloum's part. Denny's clearly and unequivocally stated franchise awards are in writing and that verbal assurances would not suffice. As the trial court noted, Halloum "failed to produce evidence that his reliance on any promises or misrepresentations allegedly made by any of these individuals is reasonable."

Unfair Business Practices

Business and Professions Code section 17200 prohibits unlawful, unfair, or fraudulent business practices. Halloum argues Denny's engaged in unfair business practices in violation of the Federal Trade Commission Franchise Disclosure Rules, the

Federal Trade Commission Act (FTC Act), the California Franchise Investment Law, and federal and state antidiscrimination laws.[1]

Franchise Disclosure Rules

The FTC Act prohibits unfair methods of competition and unfair or deceptive acts or practices affecting commerce. (15 U.S.C. § 45(a).)

The trial court found Denny's presented evidence that there had been no violation of the Franchise Disclosure Rules in that it had provided Halloum with the uniform franchise offering circular. We agree. Denny's made the required disclosures when it mailed the uniform franchise offering circular to Halloum in December 1999. Halloum presented no evidence that anything in the 317-page uniform franchise offering circular violates the Franchise Disclosure Rules.

Federal Trade Commission Act

Under the FTC Act, an act is deceptive if there is a representation that "'"is likely to mislead consumers acting reasonably under the circumstances, and . . . the representation . . . is material."'" (*FTC v. Stefanchik* (9th Cir. 2009) 559 F.3d 924, 928, citations omitted.) However, the FTC in defining "'franchise' in its franchise disclosure rule . . . includes the required payment of a franchise fee, emphasizing the need for protection of those investors who assume

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[1] Halloum also asserts that negligent misrepresentation and discriminatory employment practices against protected classes also constitute acts of unfair competition. We resolve these claims separately and adverse to Halloum.

significant financial risk by making a personally significant monetary investment upon entering into a franchise. Implicit in the concept of franchising, as viewed by the FTC, is the assumption of a financial risk by a franchisee in entering into a franchise relationship." (*Thueson v. U-Haul Internat., Inc.* (2006) 144 Cal.App.4th 664, 673.)

Here, Halloum bases his claim of a violation of the FTC Act on the premise there was a franchise agreement subject to the provisions of the FTC Act. However, Halloum never paid a franchise fee, so the protections afforded by the FTC Act for franchisees do not apply.

California Franchise Investment Law

California's Franchise Investment Law (FIL; Corp. Code, § 31000 et seq.) governs the offer and sale of franchises and prohibits false or misleading disclosures in connection with the offer and sale of a franchise. (Corp. Code, § 31201.) Any person who offers or sells a franchise in violation of specified provisions of the FIL is liable to the franchisee for damages. (Corp. Code, § 31300.)

However, the FIL protects only franchisees, "a person to whom a franchise is granted." (Corp. Code, § 31006.) As a prospective purchaser of a Denny's franchise, Halloum lacks standing to sue under the FIL. (*Dameshghi v. Texaco Refining & Marketing, Inc.* (1992) 3 Cal.App.4th 1262, 1284-1285, disapproved on other grounds by *Trope v. Katz* (1995) 11 Cal.4th 274, 292.)

Unlawful Discrimination

Halloum alleged Denny's denied him a franchise because he is an Arab from the Middle East. Halloum based this allegation, in part, on the fact that Denny's changed its position about granting him a franchise following the September 11, 2001, attacks on the World Trade Center.

Civil Code section 51.8 prohibits discrimination in the granting of franchises because of race, color, religion, sex, national origin, or disability. The plaintiff bears the initial burden of proving by a preponderance of the evidence a prima facie case of discrimination. Once the plaintiff establishes a prima facie case, an inference of discrimination arises. In order to rebut this inference, the defendant must present evidence of a legitimate nondiscriminatory reason. If the defendant presents such evidence, the burden shifts back to the plaintiff to prove the defendant's proffered reasons are a pretext for discrimination. (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-803 [36 L.Ed.2d 668]; *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 506-511 [125 L.Ed.2d 407].)

The trial court found Halloum established a prima facie claim of discrimination. In rebuttal, Denny's presented evidence that Halloum's franchise application was rejected because Mounir Sawda, the former vice president of franchise development for Denny's, never received a completed site submittal package to review. Sawda, who is Lebanese, submitted a declaration stating, "At no time did I have any discriminatory motives based on" Halloum's race, ethnicity, religion, or

heritage when he rejected Halloum's franchise application. In addition, Denny's provided evidence of numerous franchisees of Middle Eastern descent, including franchises awarded after September 11, 2001.

Halloum disputes this claim by Denny's of awarding franchises to Middle Eastern applicants. According to Halloum, "Denny's identified a total of 84 franchises owned or operated by persons it identified fell in the broad category 'Mideast.' Of those 84 franchises, 55 were owned or operated by persons identified as being Mideast-Indian; 23 persons were identified as being Mideast-Iranian; 4 persons were identified as being Mideast-Egyptian, and 2 persons were identified as being Mideast-Lebanese. None were identified as being Mideast-Palestinian. [Citation.] Mr. Halloum is an Arab and a Palestinian."

Halloum argues Indians and Iranians are not ethnic Arabs; therefore, only six franchises are owned by ethnic Arabs. According to Halloum, "The offer of such fake statistical data to create a misleading picture of the racial and ethnic composition of its franchisees is strong evidence of pretext."

We disagree. Halloum must demonstrate a triable issue by producing substantial evidence that the reasons stated by Denny's are untrue or pretextual, or that Denny's acted with discriminatory animus. In order to raise an issue regarding credibility, Halloum must set forth specific facts showing weakness in the reasons proferred by Denny's such that a reasonable fact finder could rationally find them not credible.

(*Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1038.) Halloum's challenge to the statistics Denny's provided regarding ethnic franchisees does not establish a reasonable inference that its explanation, that Halloum failed to submit a completed site submittal package, lacks credibility.[2]

DISPOSITION

The judgment is affirmed. Denny's shall recover costs on appeal.

RAYE, J.

We concur:

BLEASE, Acting P. J.

CANTIL-SAKAUYE, J.

[2] Since we find Halloum has failed to present evidence that the explanation Denny's supplied for denying him a franchise was pretextual, there is no evidence to support his unfair trade practice claim under the Unruh Civil Rights Act, Civil Code sections 51 and 51.8.